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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-437

MOBIL OIL CORPORATION,
Petitioner

v.

FEDERAL POWER COMMISSION

No. 73-457

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

FEDERAL POWER COMMISSION

No. 73-464

MUNICIPAL DISTRIBUTORS GROUP,
Petitioner

v.

FEDERAL POWER COMMISSION

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF RESPONDENTS EXXON CORPORATION, *ET. AL.*, IN OPPOSITION

Exxon Corporation, *et al.* (Exxon, *et al.*), respectfully submit their brief in opposition to the petitions filed in Nos. 73-437, 73-457 and 73-464 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on April 16, 1973.

QUESTION PRESENTED

These proceedings commenced in 1961 with the institution by the Federal Power Commission of the *Southern Louisiana Area Rate Case* to establish just and reasonable rates for producer gas sales in the Southern Louisiana area. More than 34,000 pages of testimony and 272 exhibits were received. In 1968 the Commission issued its first decision. On appeal, the court below "affirmed" but specifically fashioned its judgment to authorize the Commission to reopen the case, to consider the effect of the rates fixed by the Commission upon the critical gas shortage and to establish substitute rates, both past and prospective, if the Commission found this to be in accord with the evidence and in the public interest. Petitions for writs of certiorari to review this decision of the Fifth Circuit were denied by this court at 400 U.S. 950. Thereafter, the Commission reopened the proceedings, consolidated them with a new proceeding commenced in 1969, received 7800 pages of additional testimony and 111 new exhibits, and, finally, in July 1971 issued its decision establishing rates for the area, both past and present. These rates included "incentive provisions" permitting producers to work-off refund obligations by contributing new gas to the interstate market and allowing increases of up to 1½ cents per Mcf if, prior to October 1, 1977, the industry finds and dedicates to the interstate market new gas reserves of 15 trillion cubic feet. On appeal, the court below pointed out that the Commission's decision was clearly within

its authority under the Natural Gas Act as construed by this Court in *Permian* (390 U.S. 747) and held that the decision was supported by substantial evidence.

The question presented is whether the court below correctly held that the Commission's decision is supported by substantial evidence.

STATEMENT OF THE CASE

These proceedings commenced on May 10, 1961 (25 F.P.C. 942), with the institution by the Federal Power Commission of the *Southern Louisiana Area Rate Case* to establish just and reasonable rates for producer gas sales in the Southern Louisiana Area—an area which presently supplies one-third of the nation's interstate gas and has perhaps the highest potential for significant additions to that gas supply. Hearings and submission extended over more than seven years. Thirty-four thousand pages of testimony were recorded and 272 exhibits received. On September 25, 1968, the Commission issued its decision (40 F.P.C. 530) and, on March 20, 1969, a modified decision on rehearing (41 F.P.C. 301).

The decision was appealed to the Fifth Circuit.

In the meantime, a gas shortage had been developing throughout the nation and was becoming more apparent. After oral argument in the Court of Appeals, but before its decision, the Commission released a Staff Report concluding that a demand exceeding supply was imminent.[1] Numerous public statements of the members of the Commission and other public bodies throughout the ensuing months confirmed this conclusion and emphasized that the situation was becoming critical.

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[1] Federal Power Commission Staff Report on National Gas Supply and Demand, October 1, 1969.

On March 19, 1970, the Court of Appeals affirmed the Commission's decision, but with "serious misgivings." [2] Taking cognizance of the Staff Report and of the public statements by the members of the Commission, the court noted that "A serious shortage, in fact, may already be unavoidable. . . ." [3] The court pointed out that the Commission had made no attempt to determine whether the rates fixed in its decision were adequate to call forth sufficient gas supplies. It emphasized the seriousness of this deficiency, particularly in light of the fact that ". . . the Commission failed to approach supply or demand in either a semi-quantitative or qualitative way," [4] notwithstanding evidence that the nation was faced with ". . . a severe gas shortage, with disastrous effects on consumers and the economy alike." [5] Because of these serious deficiencies in the Commission decision, the court accompanied its "affirmance" with directions on rehearing making it clear that under its "judgment" full power was restored to the Commission to make such changes in its order, as to both past and future rates, as it found to be in the public interest:

> "We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we

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[2] *Southern Louisiana Area Rate Cases (Austral Oil Co.* v. *Federal Power Commission)*, 428 F.2d 407, 439; on rehearing 444 F.2d 125 (5th Cir. 1970); *certiorari denied sub nom., Municipal Distributors Group* v. *Federal Power Commission*, 400 U.S. 950 (1970). This decision is sometimes referred to in the record and opinions herein as "Austral" or "SoLa I." The instant decision is sometimes referred to as "Placid" or "SoLa II."

[3] 428 F.2d at 437.

[4] 428 F.2d at 436.

[5] 428 F.2d at 435, n. 87.

make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

". . . it is our judgment that the Commission shall have the power and duty to remedy the situation by changing its orders." [6]

Petitions for certiorari to review this decision of the Fifth Circuit were denied by this Court.[7]

Meanwhile, the Commission had begun to reconsider (in 1969) some of its rates for the Southern Louisiana Area.[8] Later, in line with the authority granted it by the Court of Appeals, it reopened in its entirety the prior (1961) proceeding and consolidated it with the new proceeding.[9] In these combined proceedings settlement conferences instituted by the Presiding Examiner were joined in by all interested parties—producers, pipelines, distributors (representing consumer interests), state commissions and the Commission Staff—in an effort to reach agreement on a proposal to submit to the Commission. A settlement was finally formulated which had the approval of the Commission's Staff and was agreed to by a large majority of all interests.[10] The Com-

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[6] 444 F.2d at 126-127.

[7] Nos. 669, 680-685, 691 and 692, October Term 1969, 400 U.S. 950.

[8] 41 F.P.C. 378, 42 F.P.C. 1110.

[9] 44 F.P.C. 1638.

[10] The Commission pointed out (R. 13,575-6):

"15. In support of the settlement proposal are 32 major distribution companies representing 25 percent of the gas distribution operations in the United States, serving about

mission incorporated the settlement proposal in the record and invited evidence concerning it. The Commission recognized its duty to approve such a settlement proposal only if it found the terms to be in the public interest and supported by substantial evidence.[11] Accordingly, the Commission appraised the proposal in the light of the massive record it had compiled in the proceedings since 1961, including the additional year of hearings directed largely to the terms of the settlement proposal. The additional record contains over 7,800 pages of testimony, with 111 new exhibits.[12] This evidence included testimony concerning the gas shortage and estimates of the new supply needed to alleviate the problem (see R. 13,587-13,608); economic and cost evidence in support of rate levels needed to induce additional supply (see R.

10.3 million customers at retail; 55 gas distribution companies which supply gas service to more than 10 million customers; *all* interstate pipelines purchasing gas from the Southern Louisiana area; and 46 natural gas producers, comprising 80 percent of the total gas production flowing from the area."

[11] The Commission pointed out (R. 13,580):

"We have more than a settlement proposal before us. We have the entire record made in the original Southern Louisiana proceedings, plus the record opened with the institution of Docket No. AR69-1 and concluded after Docket No. AR61-2 was consolidated with it. The settlement proposal was obviously heavily influenced by the teachings of *Austral* [the decision of the Fifth Circuit on the first appeal], as the parties perceived those teachings, and so was the record made in conjunction with it. It is our duty to review that record and to make findings thereon, and to come to conclusions therefrom. Only if substantial evidence supports it can we approve the settlement proposal, and this means that we must analyze supply and demand, supply-cost relationships, and costing methodology. Rate design, incentives, refunds, and economic considerations, as the record permits insight into these matters must also be discussed." (Footnotes omitted.)

[12] Many of these exhibits are comprehensive studies of the factual issues extending over hundreds of pages (e.g., Stanford Research Institute (Exhibit 4) reviewed by the Commission at R. 13,601).

13,603-13,632); the amount of capital required to develop additional supply (see R. 13,608-13,615) and the need for a higher price to stimulate production of additional supply (see R. 13,603-13,608).

After a careful consideration and review of all the evidence, the Commission found the proposed settlement to be just and reasonable, supported by substantial evidence and within the zone of reasonableness. The ceiling rates established by the 1968 opinion were withdrawn and were found to "perform no office" (R. 13,574). The Commission established rates for the future of 22.375 cents per Mcf for gas produced onshore, and of 21.375 cents for gas produced offshore, for all contracts dated prior to October 1, 1968 (R. 13,632, 13,642). For contracts dated on or after October 1, 1968, the rate was established at 26 cents for both onshore and offshore gas (R. 13,627, 13,642). In addition, as an incentive for increasing the gas supply, the Commission provided for an increase in the rates for gas sold under contracts dated prior to October 1, 1968 of up to 1.5 cents per Mcf contingent upon the industry finding and dedicating new gas reserves (R. 13,633, 13,643).[13]

The base (unescalated) rates established by the Commission in its final order were higher than those which would have been established had its 1968 opinion not been superseded.[14] Had the rates finally established as the just

[13] The formula works thus: If, before October 1, 1977, the industry as a whole finds and dedicates to the interstate market new gas reserves in the Southern Louisiana Area of 7½ trillion cubic feet, the rate for flowing gas will escalate by ½ cent; if, prior to that time, such reserves equal 11¼ trillion cubic feet, the rate will increase by an additional ½ cent; if, prior to the same time, such reserves equal 15 trillion cubic feet, a final ½ cent escalation will become effective.

[14] The rates which would have been established had the 1968 order become effective ranged from 17 cents per Mcf to 20.0 cents per Mcf (App. C, p. 8). "App. C" herein refers to Appendix C to Mobil's Petition for a Writ of Certiorari in No. 73-437.

and reasonable rates been made applicable to past deliveries, the refund obligations of some $375,000,000 under the superseded rates (which never became effective) would have been reduced to a nominal amount (App. C, p. 43). In accordance with the terms of the "settlement," however, the Commission fixed an amount of $150,000,000 as a "refund obligation," and provided that this amount could be worked off by the commitment of additional gas reserves to the interstate market (R. 13,637-13,638).[15] The amount of $150,000,000 was arrived at (in accordance with the settlement proposal) by approving, as a basis for refunds, rates for the 1961-1971 period which were below those found by the Commission in its final order to be just and reasonable (R. 13,636-13,637).[16]

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[15] The Commission's formula works thus (R. 13,650): Any company with a "refund obligation" to any natural gas pipeline company is allowed to reduce the refund obligation by one cent for each Mcf of new gas reserves committed in the Southern Louisiana Area to the interstate market between August 1, 1971 and October 1, 1977. Any portion of the "refund obligation" not so discharged is payable in cash with interest. The producer is required to commit at least 50 per cent of the new reserves to the purchaser to whom the refund would otherwise be payable (R. 13,650). The reserves committed to reduce the refund obligation may not be counted by the producer committing those reserves as a part of the industry reserves required to trigger the escalated prices for flowing gas referred to in footnote 13 above (R. 13,643).

[16] These refund floors approved by the Commission were 20.625 cents per Mcf (onshore) and 19.625 (offshore) for the pre-1965 period; 21.25 cents (onshore) and 20.25 cents (offshore) for the period January 1, 1965 to September 30, 1968. These price levels were in accord with various company-wide settlements during these periods and the Commission's Statement of General Policy No. 61-1 (R. 13,636-37, n. 138, n. 139). For the period October 1, 1968 to January 1, 1971, the level was computed at 30.5 percent of the difference between the rates in effect prior to October 1, 1970 and the rates fixed by the Commission in its initial opinion. While this fraction was selected to make up the balance of the negotiated $150 million dollar refund figure, the Commission found that it provided an amount approximately equivalent to the other refund calculations and was just and reasonable (R. 13,638). Cost studies in the record support all of these rates (R. 6090, 6195, 10,232, 10,250, 10,328-10,329, 13,628-13,632, 13,637-13,638).

The Court of Appeals sustained the Commission in full (App. C, p. 58). It carefully reviewed and analyzed the evidence. It held that the Commission had diligently complied with this Court's decision in *Permian*[17] and with the teachings of the Fifth Circuit's earlier decision in this case. It found the Commission's order to be just and reasonable, in the public interest and supported by substantial record evidence.

Specifically, the Court of Appeals reviewed the history of producer rate regulation and traced the long proceedings covering this particular area (App. C, pp. 6-15). It rejected categorically the "notion" that its earlier "affirmance" of the Commission's initial decision in any way impaired the Commission's power to alter or modify any of the provisions of its initial order (App. C, p. 41). It examined the propriety of taking into consideration the settlement proposal, found this to be proper, and found that the Commission's final order, which was in line with the settlement proposal, was based on substantial independent evidence (App. C, pp. 20-23, 58). It reviewed the shortage of natural gas and the potential and future importance of the Southern Louisiana Area as a source of new supply (App. C, pp. 23-29), treated the rate structure, which included incentives for new production, as an interrelated package (App. C, pp. 30-51), and concluded that the establishing of such rates was within the discretion of the Commission and was amply supported by the record. In addition, the court held that the rates clearly fell ". . . within the range of cost estimates which the evidence discloses," quite apart from the non-cost (incentive) factors considered by the Commission (App. C, p. 39).[18] Among other things, the court said:

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[17] *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

[18] Four different cost studies were presented (R. 13,628). These studies estimated costs of production ranging from 18.2 cents (R. 10,635) to 24.03 cents (R. 10,370) per Mcf for gas flowing under

"We may not as judges ignore what all others see . . . . Led by FPC, all others in the nation sense with a desperate urgency an energy supply shortage which can only be described as a crisis . . . . Thus, there is an increasing gap between supply and demand, and the consumers are feeling, or shortly will feel, the pinch. (App. C, pp. 23-24).

* * * *

"On reconsideration . . . FPC took our suggestion to heart and carefully scrutinized the supply situation. What it saw is most alarming (App. C, p. 27).

* * * *

"Fully aware of the critical gas supply shortage, and fully familiar with the factors which motivate producers to develop the resources to meet the demand, FPC approached its statutory task of establishing the "just and reasonable" rates for the sale of natural gas at the well-head in SLA. (App. C, p. 29).

* * * *

"First it established rates for both flowing and new gas which FPC believed would encourage exploration and development of the rich natural gas resources of SLA. Second, it ordered a $150,000,000 refund in accordance with the terms of the settlement proposal, but—in order to protect the capital position of the producers—allowed the producers owing these refunds to work them off by the commitment of additional reserves to the jurisdictional market. And third, it provided for periodic and contingent escalations of these ceilings.

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contracts dated prior to October 1, 1968. With respect to gas sold under contracts dated on or after October 1, 1968, the cost estimates based on a 1969 test year ranged from 19.39 cents (R. 13,618) to 38.02 cents (R. 13,617). The rates ultimately fixed by the Commission, even including all incentive increments, were well within the range of cost estimates (see page 8, *supra*).

"We hold that this structure was amply supported by 'substantial evidence on the record as a whole'. (App. C, p. 30)

* * * *

"The target goal for the 1971-1975 period was approximately 45-50 trillion cubic feet . . . . The added incentive of a contingent escalation on flowing gas rates could reasonably be thought to encourage the commitment of 15 Tcf within the 5 year period. Likewise, the refund credit structure would stimulate another 15 Tcf of new reserves. The remaining 15 Tcf needed to make up the quota would depend primarily on the basis of the inherent incentive of the rate schedule" (App. C, p. 38).[19]

REASONS FOR DENYING THE WRIT

The decision below correctly holds that the Commission's order is supported by substantial evidence, is in the public interest and was entered pursuant to the Commission's powers as defined in *Permian*[20] and other controlling decisions of this Court. The order reflects a settlement, drafted in light of the record and the Court of Appeals' first decision, which was concurred in by the Commission Staff and agreed to by most of the interested parties of all groups.[21] There is no conflict of

[19] The reasonableness of the target goals for reserves referred to in the last paragraph quoted in the text and their reasonable relationship to the prices, including incentive increments, approved by the Commission were supported by the evidence of record—evidence which the Commission carefully reviewed and analyzed (R. 13,587-13,615).

[20] 390 U.S. 747.

[21] While settlement proceedings, as such, cannot bind nonconsenting parties, the fact that virtually every producer, every pipeline, and the vast majority of the consumer interests, including every state commission except New York, considered the Commission's order fair and reasonable and reasonably calculated to achieve the Commission's permissible objectives, is in itself a strong

decisions.[22] These proceedings have consumed nearly thirteen years. They have received painstaking consideration by the Commission and an informed and conscientious review by the Court of Appeals. No unsettled principle of law is involved. The challenged incentive provisions in the Commission's order have received, in principle, the express approval of this Court.[23] They are more than

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factor supporting the Commission's conclusion that its order is just and reasonable and in the public interest. Exact compliance with the mechanics of traditional utility ratemaking never has been required of the Commission in producer regulation. Its expertise is accorded great weight in appraising the reasonableness of its rate orders. The Commission's power to consider the merits of a settlement proposal which has not been agreed to by all parties has repeatedly been sustained. As the court below said (App. C, p. 20):

> "No one seriously doubts the power—indeed, the duty—of FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits. We agree with the D.C. Circuit that even 'assuming that under the Commission's rules [a party's] rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*.' *Michigan Consolidated Gas Co.* v. *FPC*, D.C. Cir., 1960, 283 F.2d 204, 224, *Cert. denied sub. nom. Panhandle Eastern Pipe Line Co.* v. *Michigan Consolidated Gas Co.*, 1960, 364 U.S. 913. . . ."

And see *Hugoton-Anadarko Area Rate Case*, 466 F.2d 974 (9th Cir. 1972); *Pennsylvania Gas & Water Co.* v. *Federal Power Commission*, 463 F.2d 1242 (D.C. Cir. 1972); *Cities of Lexington, etc., Ky.* v. *Federal Power Commission*, 295 F.2d 109 (4th Cir. 1961); cf. *Amoco Production Co.* v. *F.P.C.*, 465 F.2d 1350 (10th Cir. 1972).

[22] See pp. 19-22, *infra*.

[23] In *Permian* this Court held (390 U.S. at 796-798):

> "The supply of gas-well gas is therefore relatively elastic, and its price can meaningfully be employed by the Commission to encourage exploration and production.
>
> * * * *
>
> "We have emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness.' * * * The Commission may, within this zone, employ price functionally in order to achieve relevant regulatory purposes; it may, in particular, take fully into

prudent and clearly serve the public interest at this time of gas supply crisis. As the court below put it, ". . . the overriding public interest . . . in the 1970's [is] the quest for an increased supply to meet an insatiable demand" (App. C, p. 44). The vital interests of the nation require the end of price uncertainty in this important producing region. This can be brought about only by the termination of these long proceedings and the effectuation of the Commission's order without further delay.[24]

Three petitions for certiorari have been filed, one by a single producer, Mobil Oil Corporation, one by the Public Service Commission of New York and one by the Municipal Distributors Group. No one of them, we submit, has merit.

1. Mobil (No. 73-437).

Mobil is the only producer seeking review of the decision below. It was one of twenty-two producers who, during the pendency of the Southern Louisiana proceeding, settled, on a company-wide basis for all rate areas, a major portion of the refund liabilities they might be

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account the probable consequences of a given price level for future programs of exploration and production. Nothing in the purpose or history of the Act forbids the Commission to require different prices for different sales, even if the distinctions are unrelated to quality, if these arrangements are 'necessary or appropriate to carry out the provisions of this Act.' * * * We hold that the statutory 'just and reasonable' standard permits the Commission to require differences in price for simultaneous sales of gas of identical quality, if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress."

[24] Nearly twenty years have elapsed since this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954) held that producer rates are subject to FPC jurisdiction. Unless these proceedings are now brought to an end there will still be no final determination of the just and reasonable rates which producers may charge in this important area.

adjudged to have at the conclusion of the various area rate proceedings.[25] Mobil's settlement worked out to a payment of 45 percent of its refund exposure (31 F.P.C. 1101, 1105).

Had Mobil awaited the final order of the Commission it would, of course, now be in the same position as the producer parties who elected to litigate rather than to settle. Mobil points out that under the formulae adopted by the Commission such nonsettling producers may satisfy their refund obligations by contributing new reserves but are not permitted to count these reserves as a part of the industry reserves which will trigger the increased price for all flowing gas (see footnote 15, page 8, *supra*). This, says Mobil, discriminates against it, because nonsettling parties (1) may work off their "refund" obligations by contributing reserves instead of paying cash as Mobil did, and (2) are not permitted to count the new reserves charged against refunds as a part of the industry reserves which will trigger the escalated prices, thus requiring Mobil to contribute a disproportionate share to the industry reserves which will trigger the escalated prices.

Mobil's argument that this is a "discrimination" which violates the teachings of *Permian* is without substance. In the first place, the Commission's order is hardly discriminatory because Mobil, through its voluntary action, placed itself in a position where it could make only limited use of the refund work-off provisions ultimately adjudged. Had the Commission's original decision become effective, Mobil's settlement bargain would have been a good one. Indeed, under its nationwide settlement Mobil was allowed to retain approximately $14.6 million of the

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[25] A list of the settling producers, with citations to the reported settlements, appears in the opinion of the court below (App. C, pp. 46-47, n. 31). A number of these producers are parties to this brief.

moneys it had collected subject to refund or approximately 55% of its total refund exposure up to January 1, 1967 (see 31 F.P.C. 1101, 1105). It has no basis to complain now because it voluntarily negotiated a settlement at rates which were different than those finally established. As the Commission said in answering Mobil's contention (R. 13,628):

> "Parties who enter into settlements or those who refuse to do so, always run the risk that the ultimate Commission determination may be higher or lower than the settlement levels."

And the Court of Appeals pointed out (App. C, p. 47, n. 31):

> "If the SoLa II rates were lower than those established in these agreements, the private settlements would have been worthwhile. As it turns out, FPC was more generous in SoLa II than was anticipated. But this clearly furnishes no basis for attack."

But independently of the foregoing, Mobil's contentions lack substance. In *Permian* this Court sustained the Commission's power to classify producers and to impose different requirements on different classes. It approved vintage pricing over the objection that such a method of pricing necessarily establishes different prices for different producers for gas of identical quality. The Court pointed out that "The Commission's responsibilities include the protection of future, as well as present, consumer interests" and held that within a "zone of reasonableness" the Commission is free under the Natural Gas Act to employ price functionally in order to achieve relevant regulatory purposes," taking particularly into account "the probable consequences of a given price level for future programs of exploration and production" (390 U.S. at 787, 795-798). As pointed out above (pp. 12-13), this is exactly what the Commission did here, with substantial evidence supporting its action. Mobil's complaint

of discrimination is merely an attack on the details of the Commission's administration of its acknowledged powers. Mobil is in no different position from any other producer, except for such disadvantage as it may have because of its voluntary settlement. Other producers who settled do not join in its complaint.[26]

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[26] Mobil makes a number of supplementary contentions, no one of which furnishes any basis for review by this Court. These contentions are as follows:

(1) That the rates of return allowed by the Commission (13 percent on old gas and 15 percent on new gas) are too low (Pet., p. 16), a contention resolved against Mobil by both court and Commission below (App. C, pp. 31-34, 37; R. 13,621, 13,631).

(2) That the five-year "moratoria" fixed by the Commission are unjust and unreasonable (Pet., p. 28). The court below held this complaint premature; that if hardship developed relief could be sought; and that such moratoria were sustained in *Permian* (App. C, pp. 51-52).

(3) That the minimum charges established for the transportation of liquids by pipelines are too high (Pet., p. 30), a contention resolved against Mobil by both court and Commission below (App. C, p. 57, R. 13,634). Mobil also contends that the Commission had no jurisdiction to fix such charges, a question involved in a companion docket recently decided by the Court of Appeals for the District of Columbia in *Mobil Oil Corporation* v. *Federal Power Commission*, No. 72-1471, decided July 11, 1973. This contention was not considered by the court below, is not a significant factor in this rate case and should be reviewed by this Court, if at all, on certiorari to the District of Columbia court in the appropriate docket.

(4) That the Commission's allowance, as cost items, of payments to royalty owners on the basis of payments made during past years was erroneous, for the reason that increases in royalty payments are anticipated (Pet., p. 31). The court below answered (App. C, p. 56):

> "But we are not willing to alter or stay the implementation of area wide rates for the entire industry merely on the basis of what *might* happen to *some* producers' costs *if* this statement of the law prevails.
>
> "If, as subsequent events develop, the producers are put in a bind by their royalty obligations, they may certainly petition FPC for individualized relief."

2. New York Public Service Commission and Municipal Distributors Group (No. 73-457 and 73-464).

Petitioners' principal contention in both of these cases is that the Commission was required to impose a refund liability of some $375 million dollars upon the producers, an amount which petitioners compute on the basis of rates which would have prevailed had the Commission's first order gone into effect. Each petitioner argues as though the case presented the question whether the Commission has power, after an unqualified affirmance of a rate order by a Court of Appeals, thereafter retroactively to change the rates so fixed and so affirmed. No such question is presented on this record. There was no unqualified affirmance by the Court of Appeals. In its first decision, the court made it "crystal clear" that the Commission should have authority to reopen any part of its orders "including those affecting revenues from gas already delivered" (see p. 4, *supra*).[26a] The court's authority to render such a decision, and the Commission's authority to act upon it, is unquestionable (*Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364, 373, 375 (1939); *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481, 484 (7th Cir. 1942).

The 1968 Commission opinion and the rates proposed thereunder never became effective. The Commission's order continuously was stayed by orders of the Commission or the court until withdrawn by the Commission in its second opinion and order (R. 13,572, 13,574). The Commission has the power to change its administrative orders which have never become final because of court review (see *United Gas Improvement Company* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *S.E.C.* v. *Chenery Corporation*, 332 U.S. 194, 200-201 (1947);

[26a] The court emphatically reaffirmed that ruling in its present decision (App. C., pp. 30-31, 41-42).

Hunt Oil Company v. *F.P.C.*, 334 F.2d 474 (5th Cir. 1964).

Additionally, petitioners contend that even if the Commission had the power to reduce the "refund liability" no evidence supports its figure of $150 million dollars. As the court below pointed out, the "short answer" to this contention is that if the Commission had entered a customary refund order based on the "just and reasonable" rates established for the future in its final order, the amount of refund would have been nominal (App. C, p. 43). However, the court further pointed out, in line with *Permian* (390 U.S. at 826-827), that under the terms of the Natural Gas Act the Commission is not required to order refunds and that it is empowered to structure any refund order in a manner which ". . . in its administrative discretion and expertise . . . will fairly balance the interests of both consumers and producers while achieving the overriding public interest. . . ." (App. C, pp. 43-44).[27]

But, in addition—both of the foregoing answers apart—the evidence in the record is clearly sufficient to support a finding by the Commission that no refunds at all

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[27] Arguments similar to those made by petitioners here were made in the *Hugoton-Anadarko Area Rate Case, supra,* but were rejected in these words:

> "As the Commission points out, section 4(e) of the Act, 15 U.S.C. § 717c(e), does not require refunds where unlawful rates have been collected in prior years, but leaves this to the discretion of the Commission. The view that the Commission's refund power is discretionary has support in the court decisions. In *Permian*, 390 U.S. at 767, 88 S.Ct. 1344, 20 L.Ed.2d 312, the Supreme Court made it clear that the Commission is free, within the limits imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests. In exercising this discretion it is "the duty of the Commission to look at 'the backdrop of the practical consequences . . .'" of its refund order. *Federal Power Commission* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145, 155, 83 S.Ct. 211, 216, 9 L.Ed. 2d 199 (1962)." 466 F.2d at 990-991.

should be required.[28] And further, as pointed out above, cost studies in the record fully support each of the rates upon the basis of which refunds were computed (supra, p. 8, n. 16).[29]

3. Alleged Conflict with the Texas Gulf Coast Area Natural Gas Rate Cases.

All three petitions rely upon an asserted "direct conflict" with the decision of the Court of Appeals for the District of Columbia in *Texas Gulf Coast Area Natural Gas Rate Cases*, decided August 24, 1973.[30]

There is no conflict of decisions. On the contrary, the decision of the Court of Appeals for the District of Columbia is in accord with the decision below on the relevant issues of law; only factual differences distinguish the two cases.

The District of Columbia court recognized the principle of *Permian* that the Commission may ". . . 'employ price functionally in order to achieve relevant regulatory purposes; it may, in particular, take fully into account the probable consequences of a given price level for future programs of exploration and development'" (Sl. Op., p. 101, footnote omitted). Indeed, the court emphasized that ". . . non-cost factors directed to the

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[28] The evidence demonstrates that the revenues received by the producers for gas production from the Southern Louisiana Area were less than the costs incurred in finding and producing this gas on an industry-wide basis (Exhibit 91, R. 10,633; Exhibit 92, R. 10,635) a ground which this Court in *Wisconsin* v. *F.P.C.*, 373 U.S. 294 (1963) found sufficient to excuse refunds. The Commission's Staff witness also reached this conclusion and recommended no refunds (R. 6776, 6788).

[29] Municipal Distributors Group and New York Public Service Commission also argue that the incentive provisions in the rates and refund order are discriminatory—a point answered above (pp. 14-16).

[30] Copies of this decision have been filed as a Supplement to the Appendix to Mobil's petition in No. 73-437.

problem of supply have, since *Permian Basin*, played an increasingly central role, not only in the structure of the area rate systems decreed by the Commission, but also in the calculation of the rates themselves." (Sl. Op., p. 105.) The court "stressed" that ". . . we are not precluding the use of increased flowing gas costs . . ." (Sl. Op., pp. 65-66), and, with respect to refund work-offs, agreed with the Fifth Circuit that it was not "mandatory upon the Commission to order payment," that the court properly could approve a " 'refund credit program [which] would not benefit all producers equally' " and "that the FPC had discretion to provide an incentive through the 'work-off' provision" (Sl. Op., p. 69). What the District of Columbia court complained of was the failure of the Commission in the case before it to direct the court's attention to substantial evidence in the record which supported the Commission's findings and to provide the court with an adequate statement of its reasons for the actions which it took (see Sl. Op., pp. 55, 59, 60, 61, 63, 66, 69, 70, 71, 86, 93-94, 108, 109, 111). The court acknowledged (Sl. Op., p. 68):

> "There may be a sound explanation for the system adopted, but we have not been offered one by the Commission."

And it summarized its decision (Sl. Op., p. 108):

> "But on the basis of the record before us, we have no way of knowing what these reasons might have been; * * * * Indeed, for all we know they [the rates] may be more than adequate. We simply do not have, and are not given, sufficient information to make this judgment."

Thus, Mobil's statement (at Pet., p. 19) that the "holdings" of the Fifth Circuit ". . . as to validity of the refund credit formula and related rate structure are now in conflict with the opinion" of the District

of Columbia court in the *Texas Gulf Case* is inaccurate, as are like statements by the other two petitioners. Each case involved a different production area and was tried on a different record; the question decided by each court was whether the evidence in the record before it supported the Commission's decision—a pure question of fact. No significant conflict, of course, is created by the views stated by each court as to whether the Commission in the respective decision before it had sufficiently aided the reviewing court by its analysis and designation of the pertinent evidence.

The lack of conflict is highlighted by the fact, discussed at some length in the opinion of the District of Columbia court (Sl. Op., pp. 51-53), that counsel for the FPC sought to sustain the decision in the *Texas Gulf Case* by contending that the order in that case could be sustained on the basis of the record in the case at bar. The contention was rejected by the District of Columbia court. It pointed out that in the case at bar "[T]he FPC . . . was holding separate hearings in rate proceedings for different areas," (Sl. Op., p. 52, footnote omitted) and that no basis appeared for ". . . charging the parties in one proceeding with notice of the contents of the record in another proceeding. . . ." (Sl. Op., p. 52.) In addition, the District of Columbia court noted that the settlement proposal before the Commission in the *Southern Louisiana Area Case* was a sharply distinguishing feature between the two cases (Sl. Op., p. 52).

It is significant also to note that the District of Columbia court, in its decision in *Mobil Oil Corporation* v. *Federal Power Commission*, decided July 11, 1973, referred to the decision of the Fifth Circuit in the case at bar as follows:

> "Our inability here is in marked contrast to the situation in the recent area rate decision rendered

in *Placid Oil Co.* v. *FPC*, —— F.2d ——, No. 71-2761 (5th Cir., 16 Apr. 1973). In that situation the court was given a full record with which to judge the agency's action." [31]

There can be no conflict of decisions on two such totally different factual records.

CONCLUSION

The petitions for writs of certiorari should be denied.

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[31] Slip Opinion, No. 72-1471, p. 42, n. 79.

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CERTIFICATE OF SERVICE

The within Brief In Opposition has been served in accordance with Rule 33 by mailing three (3) copies thereof, postage prepaid, to all counsel of record and to the Solicitor General of the United States this 30th day of October, 1973.

/s/ Justin R. Wolf
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